(1)

Supreme Court, U.S.
FILED
98 467 SEP 17 1998
OFFICE OF THE CLERK

Docket Number _____

SUPREME COURT OF THE UNITED STATES

1998 October Term

In re WILLIAM H. VIEHWEG

On Petition for an Extraordinary Writ
to United States Court of Appeals for the Eighth Circuit

PETITION FOR EXTRAORDINARY WRIT

William H. Viehweg
Petitioner
114 West 2nd South St.
Mt. Olive, Il 62069
314-999-5061

43pp

QUESTION PRESENTED FOR REVIEW

Does Susan H. Mello, a defendant party in this civil action for legal malpractice, filed in the federal courts, have the legal standing to demand to be recognized, within said action, not as a pro se, but as an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing as legal counsel for herself, and does the court have the legal standing to so recognize her, and grant her all of said capacities' favorable inferences, presumptions, and standing, including the authority to sign subpoenas?

Alternatively, if Susan H. Mello and the federal court's do have the above said legal standing, does Mello's simultaneous standing before the court, and ultimately the jury, as both party litigant and as an officer-of-the-court advocate, as legal counsel for herself, not as a pro se, deny Viehweg, the non-attorney, pro se plaintiff, his right to equal justice, per the Fifth Amendment of the United States Constitution?

PARTIES TO PROCEEDING

Petitioner William H. Viehweg, an individual, Plaintiff/Appellant.

Respondent Susan H. Mello, an individual, Defendant/Appellee.

Respondent Michael E. Gans, Clerk of Court, United States Court of Appeals for the Eighth Circuit.

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
Parties to Proceeding	2
Table of Contents	3
Table of Cited Authorities	4
Citation of Opinions in Case	4
Basis for Jurisdiction	5
Constitutional Provisions	5
Statement of Case	6
Argument	11
Conclusion and signature	17

Appendix

Order denying reconsideration	A-2
Order denying motion to disqualify	A-3
Order denying suggestion for amicus curiae	A-4
18 U.S.C.A. §912	A-5
28 U.S.C.A. §1654	A-5
Fed. Rule Civ. Proc. 45(a)(3)	A-5
Missouri Supreme Court Rule 4 - 3.7(a)	A-5
Entry of appearance at Appellate Court	A-6
Entry of appearance at District Court	A-7
Motion suggesting amicus curiae	A-8
Motion to disqualify	A-13
Memo in opposition to motion to disqualify	A-17

TABLE OF CITED AUTHORITIES

Anderson v Pryor 537 F.Supp 890 (W.D. Mo 1982)
Markland v Travel Travel Southfield
810 S.W.2d 81 (Mo.App. 1991)
Qualls v Field Enterprises Education Corporation
302 F.Supp 152 (E.D. Mo 1969)
Reed v Labor and Indus. Relations Com'm
789 S.W. 2d 19 (Mo. banc 1990)
Sappinton v Miller 821 S.W.2d 901 (Mo. App. 1992)
Utlaut v Glick Real Estate Co.
246 S.W.2d 760 (Mo. 1952)
Viehweg v Mello ___ F.Supp ___ (E.D. Mo. 1998)

18 U.S.C. §912
28 U.S.C. §1291
28 U.S.C. §1332
28 U.S.C. §1651(a)
28 U.S.C. §1654

Fed. Rule of App. Proc. Eighth Circuit 27B
Fed. Rule of Civ. Proc. 11
Fed. Rule of Civ. Proc. 45
Fed. Rule of Civ. Proc. 73

Missouri Supreme Court Rule 4 - 3.7(a)

CITATIONS

Only one opinion is due to be published in this case. That opinion was entered on final judgment at the trial court level, and does not address the issue in this petition.

Viehweg v Mello ___ F.Supp.___ (E.D. Mo 1998)

BASIS FOR JURISDICTION

On August 24, 1998 the United States Court of Appeals for the Eighth Circuit denied the Petitioner's motion to disqualify Appellee Susan H. Mello from representing herself as an officer-of-the-court, legal counsel for herself, and to disqualify her counsel, Scott C. Harper and Karen M. Speiser, of the law firm of Brinker and Doyen.

On September 4, 1998, the appellate court denied the Petitioner's motion for reconsideration of the appellate court's above August 24th ruling.

This Court has jurisdiction to review the above August 24, 1998 order per 28 U.S.C. §1651(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against themself, nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On February 10, 1997 petitioner William H. Viehweg filed a complaint against the respondent Susan H. Mello in the United States District Court, Eastern District of Missouri, Eastern Division. Jurisdiction was based on diversity of citizenship, 28 U.S.C. §1332. The complaint alleged three counts of legal malpractice, two for negligence, and one for constructive fraud, and demanded a jury trial.

Per Federal Rule of Civil Procedure 73, the case was assigned to Magistrate Judge Thomas C. Mummert.

On March 14, 1997 Mello entered her personal appearance, through her first counsel, Brian Plegge of Moser and Marsalek, by moving to dismiss.

On April 10, 1997 Mello entered her attorney appearance as co-counsel for herself. Said appearance states the following:

> " Comes now Susan H. Mello and enters her appearance as co-counsel for the Defendant (with Brian Plegge designated lead counsel with Plaintiff directed to contact lead counsel)".

The trial court docket listed Mello's entry as "ATTORNEY APPEARANCE as co-counsel for defendant Susan H. Mello by Susan H. Mello".

On June 24, 1997 Viehweg moved for sanctions, per Fed. Rule Civ. Proc. 11, pertaining to Mello's entry of appearance, arguing the following: "though the defendant may rightfully represent herself pro se, she may not under the false representation of an attorney representing her client." Said motion included as an exhibit a May 23, 1997 letter Mello sent Viehweg stating the following:

> "the requirement to "serve" me with copies is not due to my status as a party, but as counsel. Rule 5(b) covers only those situations where there is a party or counsel, not where a party is also counsel." As with any multiple counsel situation, unless you obtain an order limiting service under Rule 5(c), it is not sufficient to send copies only to Mr. Plegge and will not be considered

proper or timely service."

Mello responded by filing two motions to strike. On December 2, 1997, the trial court summarily denied Viehweg's motion.

On October 15, 1997 Viehweg moved to quash Mello's entry of appearance as counsel for herself, arguing the following:

"That as the State of Missouri does not recognize self-representation as the practice of law, see Reed v Labor and Indus. Relations Com'm 789 S.W.2d 19 (Mo. banc 1990), Ms. Mello cannot, by law, appear as legal counsel for herself."

Mello responded by attempting to file a motion to strike said motion, but the trial court refused to accept her filing (docket 110). On December 2, 1997, the trial court summarily denied Viehweg's motion.

On November 10, 1997 Viehweg moved to quash three subpoenas ordering production of documents subject to the privilege of confidentiality, arguing that said subpoenas

"are void on their face as having violated Rule 45 by being issued, not by the defendant's attorney, Mr. Plegge, as an officer of this Court, or by the Court Clerk, but by Susan H. Mello, personally, who as a party to this action, is without authorization to issue subpoenas."

On December 2, 1997, the trial court denied said motion.

On November 17, 1997 a pre-trial motion hearing was held before Magistrate Judge Thomas C. Mummert, and that the following are excerpts from the transcript of said hearing, with said transcripts having been filed in the appellate court as the record on appeal:

BEGINNING OF TRANSCRIPT

<u>On the issue of Mello's self-representation</u>

Page 12, line 13 through Page 13, line 10

THE COURT: The second issue is the issue that's been plaguing this lawsuit, -- no offense to Mr. Plegge, but plaguing this lawsuit from the beginning, and that is Ms.

Mello's dual position as a litigant and as an attorney. Ms. Mello has the right, Mr. Viehweg, to represent herself. She has a right to represent herself whether she's a lawyer or not a lawyer, but the fact that she is a lawyer doesn't preclude her from being an attorney. The case you cite is not on point and has nothing to do with this lawsuit. The case you cite of Reeve vs. Labor and Industrial Relations deals with someone representing a corporation as a - - an attorney has to come in and represent a corporation. A corporation cannot represent itself. You certainly have a right to represent yourself, as does Ms. Viehweg, - - I'm sorry, Ms. Mello. So, she certainly has that right to do that. I really don't want a response, I'm just telling you what I'm doing here. So, your Motion to Strike her as an attorney and all the frivolous motions you've filed about that, and all the cases, denied. She has a right to represent herself, okay? Now, I'll agree with you to some extent, Mr. Viehweg, I don't think it's the most intelligent decision ever made in the history of juris prudence, but that's her call, okay? She has a right to do that.

On the issue of Viehweg's pro se status

Page 16, line 9 through 18

THE COURT: From now on, getting back to pleadings, more specific, it seems that every time there's a motion filed by Ms. Mello's side of the table I have to look at all of the lawsuits that Mr. Viehweg has filed since he's been alive I don't want to see those anymore. I understand that he's filed these lawsuits. You know, we aren't the brightest people down here, but we can figure it out after a certain period of time. I know there's a lot of lawsuits, I don't need to, -- it doesn't need to be repeated each time the case comes before me with a motion. So, stop that.

On the issue of Viehweg's pro se status

Page 19, line 16 through Page 20, line 6

Page 21, line 3 through 8

MR. VIEHWEG: I don't oppose to taking a (35) Exam if I'm asking for emotional distress. My concern with the initial request was that it didn't have any limitations.

THE COURT: It was unlimited.

MR. VIEHWEG: And when I read the memorandum of law it looked like they were trying to rule me incompetent.

THE COURT: Mr. Viehweg, you hit the next issue I want to address. That Rule 35 Exam is gonna be limited to whether or not Mr. Viehweg has suffered an emotional distress as a result of the actions of this, -- were precipitated by this lawsuit. We're not gonna get into, -- I can't imagine an MMPI being, -- I mean, the request that was made by the Defendants in this case was extremely over broad. This is not a question of whether or not Mr. Viehweg is incompetent because he's filed a bunch of lawsuits, that's not the issue in this case.

and Page 21, line 3 through 8

THE COURT: What I'm precluding the Defendants from getting into is it appears to be, based on their motions, is that they're saying, "Hey, this guy's filed a bunch of lawsuits so he's obviously, -- there's something wrong with him," and that issue is not before the Court, -- or I won't accept it as before the Court. Okay.

On the issue of depositions

Page 22, line 1 through 12

MS. MELLO: Your Honor, I realize that that's unusual relief to ask for. I'm very afraid of Mr. Viehweg. I put that in my Supplemental Motion. This is not a matter that the man has filed a number of lawsuits, if you read them they're frightening. He's called my home, even after I asked him not to. I am afraid that in the course of the deposition where I'm sworn to tell the truth, if he asks me for an opinion it will fester, it will escalate, and it will end up in domestic, -- some kind of violence. I am very physically afraid, that's why I've asked the Court to give me an opportunity for written questions where I can weigh what is said to him so it may not antagonize him.

and Page 22, line 20 through 21

MR. VIEHWEG: I can say that I haven't done anything.

and Page 23, line 16 through 19

THE COURT: I'm not sure there's any evidence

before the Court that that fear is documented, but I appreciate the fact that people do get upset and things can happen.

END OF TRANSCRIPT

On May 26, 1998 the trial court granted Mello's motion for summary judgment ruling in her favor on all three counts.

On June 24, 1998 Viehweg filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit with appellate jurisdiction under 28 U.S.C. §1291.

On June 30, 1998 Viehweg filed with the appellate court his locally required Information Form A, which stated that one of the issues on appeal would be whether a party litigant can simultaneously be recognized by the court as an officer-of-the-court advocate.

On July 16, 1998 Mello, having already responded through counsel Scott C. Harper of Brinker and Doyen, filed her entry of attorney appearance with the appellate court as co-counsel for herself. That said notice of appearance did not contain proof of service, and that no service was made upon Viehweg.

On July 23, 1998 Viehweg filed his motion suggesting that the appellate court request amicus curiae briefs from bar associations on the issue of whether a party litigant can simultaneously be recognized by the court as an officer-of-the-court advocate. The appellate court clerk denied said motion per Eighth Circuit Rule 27B(a).

On August 19, 1998 upon Viehweg just discovering that Mello had entered her appearance, Viehweg filed his motion with the appellate court to disqualify Mello from acting as an officer-of-the-court, to disqualify her counsel, Scott C. Harper and Karen L. Speiser of Brinker and Doyen, and for a protective order prohibiting Mello from referring to herself as "counsel for". Mello filed a response requesting sanctions, stating:

> "Appellant fails to direct this court to any statute or court rule stating that Appellee Mello may not enter

her appearance as counsel on her own behalf. Appellee is unaware of any such statute or rule preventing a party from acting as her own counsel if she is a licensed attorney".

On August 24, 1998 the appellate court summarily denied Viehweg's motion to disqualify Mello. Said order was entered by the Court Clerk, Michael E. Gans, per Eighth Circuit Rule 27B(a)

On August 27, 1998 Viehweg requested reconsideration of said order by a judge, per Eighth Circuit Rule 27B(a). Mello filed a response requesting sanctions, stating "Appellant should be barred from filing any further frivolous motions and his conduct sanctioned by this Court".

On September 4, 1998 the appellate court summarily denied Viehweg's request for reconsideration. Said order was entered, again, by the Court Clerk, Michael E. Gans, at the direction of the Court.

On September 8, 1998 Viehweg filed a motion with the appellate court to stay the briefing schedule until such time as Viehweg could petition to this Supreme Court for an extraordinary writ.

On September 14, 1998 the appellate court summarily denied Viehweg's motion to stay the briefing schedule. Said order was entered by the Court Clerk, Michael E. Gans, per Eighth Circuit Rule 27B(a).

ARGUMENT

An individual can not act as an agent of a department of the United States without legal authorization. Therefore the burden is on Mello, as a defendant party in this civil action for legal malpractice, filed in the federal courts, to cite law showing that she has the legal standing to demand to be recognized, within said action, not as a pro se, but as an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing, within the practice of law, as legal counsel for herself. The burden is also on the federal

courts to cite law showing that they have the legal standing to so recognize Mello, and grant her all of said capacities' favorable inferences, presumptions, and standing, including the authority to sign subpoenas.

Further, as the federal courts have a duty to avoid even the appearance of partiality, the burden is on the courts to show that, by their recognizing Mello's self-representation, not as that of a pro se, but as that of an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing, within the practice of law, as legal counsel for herself, the courts do not deny Viehweg, a non-attorney, pro se plaintiff, his right to equal justice, per the Fifth Amendment of the United States Constitution.

Though the burden is upon Mello and the courts, neither has cited a single law supporting their actions. In fact, case law is strangely absent any cases, in any court, on any level, on this issue. Even Corpus Juris Secundum is silent. What law does exist, runs contrary to Mello's and the court's actions. Thus the need for The Supreme Court to directly address this issue, decide with opinion, and promulgate it.

Any authority that Mello may exert as an attorney stems from her license from the State of Missouri to practice law. The court's ability to recognize her appearance in any action as an advocate on behalf of a party litigant stems from said law license. Isn't it reasonable to question whether Mello's self-representation constitutes the practice of law?

The right to practice law is not a natural or constitutional right, nor unqualified or absolute right. It is a privilege burdened with conditions.

The case of *Reed Vs. Labor and Indus. Relations Com'm* 789 S.W.2d 19,21 (Mo. banc 1990) contains the Missouri Supreme Court's definition of the practice of law, as follows:

> "[One] is engaged in the practice of law when he, for a valuable consideration . . . appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner,

referee, board, body, committee, or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law. "

As per the above definition, Mello, in order to be engaged in the practice law, must have a client. It is also well established under Missouri law that an attorney/client relationship is an agency relationship requiring manifestation of consent between two persons. *Sappington v. Miller* 821 S.W.2d 901,904[8] (Mo.App. 1992); *Anderson v Pryor* 537 F.Supp 890,894[1][2] (W.D. Mo. 1982); *Qualls v Field Enterprises Education Corporation* 302 F.Supp 152,153[3] (E.D. Mo. 1969) *Markland v Travel Travel Southfield* 810 S.W.2d 81,83 [2] (Mo.App. 1991); *Utlaut v. Glick Real Estate Co.* 246 S.W.2d 760,763[2] (Mo. 1952).

As Mello is only one person, she cannot by law have an agency relationship with herself, and therefore can not consider herself a client. As Mello does not have a client, her self-representation does not constitute the practice of law. As Mello's self-representation does not constitute the practice of law, her self-representation derives no legal authority from the State of Missouri. Absent said legal authority, Mello is not only is without legal standing to demand the court to recognize her as an officer-of-the-court advocate, legal counsel for herself, but her actions are more appropriately described as the illegal practice of law.

Black's Law Dictionary describes the term "counsel for" as one person, an attorney, who represents another person, the client. It describe's self-representation as *pro se*. Mello's use of the term "counsel for" to describe her own self-representation is misrepresentation.

Besides, even if Mello's self-representation could be considered the practice of law, she could not ethically enter her appearance on behalf of herself. Missouri Supreme Court Rule 4, concerning professional conduct, Rule 3.7(a), prohibits an attorney from entering an appearance as counsel on behalf of a client, when the attorney is a primary witness

in the case. Mello is the primary witness in Viehweg's action against her for legal malpractice.

Further, the federal courts, under federal statute 28 U.S.C.A. §1654, provide Viehweg and Mello, as equal parties, only two options. They can either plead and conduct their cases personally, pro se, absent any negative presumption or inference from such standing, or they can plead and conduct their cases through counsel. If Mello were allowed to plead and conduct her own case, personally, as an officer-of-the-court advocate, an agent of the United States Department of Justice, appearing, within the practice of law, as legal counsel for herself, her elevated pro se status would violate said statute by creating a negative inference on Viehweg's pro se status. For instance, how would Mello's status be explained to the jury without disparaging Viehweg's?

Thus we come to the question of how Mello, a party, could have legally authorized subpoenas requiring the production of documents? Federal Rule of Civil Procedure 45(a)(3) provides parties requiring subpoenas with two options. Option one is to obtain a subpoena signed by the court clerk. Option two is to have their legal counsel sign the subpoena. There is no legal authority for Mello, as a party, to sign subpoenas.

Consider what would have happened had Viehweg, a party, signed a subpoena. He would have committed a felony. Federal statue 18 U.S.C.A. §912 provides that anyone who falsely assumes or pretends to be an officer acting under the authority of a department of the United States, and demands the production of documents, shall be fined, and/or imprisoned up to three years. Therefore, as both Viehweg and Mello are parties, and the courts have a duty to treat them equally, didn't Mello commit a felony by signing the subpoenas?

The courts not only have a duty to avoid partiality, they have a duty to avoid even the appearance of partiality. In this case, the federal courts must concern themselves with the public's perception of the courts' willingness to avoid

partiality toward one of their own.

In an analogy to the *average man test*, certainly an ordinary federal judge, being first and foremost an attorney, is so disconnected from Viehweg's representative group (non-attorneys), and so connected with Mello's representative group (attorneys), that he would be biased against Viehweg without even recognizing his prejudice. In this case, as Mello is a pro se attorney and member of the trial and appellate court's bar, and as Viehweg is a non-attorney pro se, certainly the court's duty to avoid even the appearance of partiality is heightened.

Mello's entry of appearance as legal counsel for herself was, at the minimum, made in bad faith. Mello is held to have known that the status of party and the status of legal counsel appearing for a party, are mutually exclusive. Why need did Mello have to demand recognition as counsel for herself? What legal need would not be provided her by the court in her proper status as pro se. Mello could only have entered her appearance as counsel for herself to wrongfully avail herself of all of said capacities rights, preferences, favorable presumptions,and special standing, and thereby favorably differentiate her self-representation from Viehweg's self-representation.

Viehweg's right to equal justice, before an unbiased and unprejudiced court and jury, guaranteed him by the Fifth Amendment of the United States Constitution, precludes the courts from recognizing Mello, or allowing Mello to seek recognition, as anything other than her proper self-representative status, exactly equal to Viehweg's, a party litigant appearing pro se.

Mello's insistence in attacking and disparaging Viehweg's status as pro se, all the while refusing to represent herself in her proper status as pro se, and falsely representing herself as legal counsel, amounts to intentional obstruction of justice. The only purpose Mello could have had for such actions was to wrongfully bias and prejudice the court, the jury, and any and all witnesses in her favor, and against Viehweg. Such suborning of partiality is unlawful per se.

Mello's attorneys, Scott C. Harper and Karen M. Speiser, of the law firm of Brinker and Doyen, are held to have known that their client's entry of appearance as legal counsel for herself pursued an injustice. They are held fully liable for their client's wrongful conduct. They not only knowingly condoned her wrongful actions, they defended her wrongful actions.

The courts should not be made a party to injustice. The trial court, by recognizing Mello as legal counsel for herself, denied Viehweg equal justice. When Viehweg appealed to the appellate court to address the issue of Mello's representation, the appellate court recognized her as legal counsel for herself. Viehweg can not receive equal justice in the appellate court if Mello is recognized as legal counsel for herself. Viehweg has no court left in which to seek justice, other than The Supreme Court. The burden should not be placed on Viehweg to have to demand equal justice.

Obviously, one of the biggest problems in this issue is the lack of a controlling citation. It is reasonable to conclude that Mello would probably never have even attempted to demand recognition as legal counsel for herself, nor the courts so recognizing her, had their been a decisive authority on the issue. It is reasonable to conclude that absent such a citation from The Supreme Court, such injustice will became a plague upon these honorable courts.

CONCLUSION

Mello had no legal standing to enter her appearance as legal counsel for herself. The courts have no legal standing to so recognize her. Such recognition of Mello by the courts violates Viehweg's constitutional right to equal justice, per se. Mello, and her attorneys, knowingly pursued an injustice. Absent The Supreme Court's exercise of its supervisory powers, such injustice will be summarily condoned by the federal courts.

Viehweg prays for a writ prohibiting Mello from representing herself as legal counsel for herself in this case, and for a writ of mandamus ordering the Eight Circuit Court of Appeals Clerk, Michael E. Gans, to strike Mello's entry of appearance as legal counsel for herself, to disqualify attorneys Scott C. Harper and Karen M. Speiser and their law firm of Brinker and Doyen from representing Mello in this action, and to strike any and all pleadings, motions, and/or documents that were filed by Mello and/or her attorneys and in any manor refer to Mello as legal counsel for herself, and, lastly, for whatever other relief this Honorable Court deems proper.

Respectfully submitted,

William H. Viehweg,
Petitioner
114 West 2nd South St.
Mt. Olive, IL 62069
(313)-999-5061

APPENDIX

United States Court of Appeals
for the Eighth Circuit

No. 98-2732EMSL

William H. Viehweg,
Appellant,
v
Susan H. Mello,
Appellee.

Appeal from the United States
District Court for the
Eastern District of Missouri

The motion of the appellant for reconsideration of the Court's August 24, 1998 order is hereby denied.

September 4, 1998

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
for the Eighth Circuit

No. 98-2732EMSL

William H. Viehweg,
Appellant,
v
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Appellant's motion to disqualify appellee, her lawyers and their law firm is denied.

August 24, 1998

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
for the Eighth Circuit

No. 98-2732EMSL

William H. Viehweg,
Appellant,
v
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Appellant's request that this court solicit amicus curiae briefs from bar associations is denied. This denial is without prejudice to either party soliciting amicus curiae briefs solely through their own efforts.

July 29, 1998

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

28 U.S.C.A. §912:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

28 U.S.C.A. §1654:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Federal Rule of Civil Procedure 45(a)(3):

The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

Missouri Supreme Court Rule 3.7(a):

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

United States Court of Appeals
Eighth Circuit

William H. Viehweg,
Plaintiff/Appellant

v No. 98-2732EMSL

Susan H. Mello,
Defendant/Respondent.

ENTRY OF APPEARANCE

Comes now Susan H. Mello and enters her appearance as co-counsel for Defendant.

Respectfully submitted,

by: (Signature)
Susan H. Mello,
7751 Carondelet, Suite 403
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Home No (314 721-3926
Co-Counsel for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

William H. Viehweg
Plaintiff,

v. Cause No. 4:97CV00211 TCM

Susan H. Mello,
Defendant.

Entry of Appearance as Co-Counsel

Comes now Susan H. Mello and enters her appearance as co-counsel for the Defendant (with Brian Plegge designated lead counsel with Plaintiff directed to contact lead counsel).

Respectfully submitted,

By S. Mello (signature)
MO #31158
USDC #3841
7751 Carondelet, #403
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Co-Counsel for Defendant

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

WILLIAM H. VIEHWEG,
Plaintiff / Appellant

v. Appeal No. 98-2732EMSL

SUSAN H. MELLO,
Defendant / Appellee

MOTION FOR AMICUS CURIAE BRIEF

Comes now appellant, William H. Viehweg, and in support of his motion for an amicus curiae brief states as follows:

1. That at issue in this appeal is whether a defendant party in a civil action, who happens to be an attorney, can not only represent herself pro se, but can also demand to be recognized by the trial court as an officer of the court, with all of said capacities' favorable presumptions, privileges, and rights, without tipping the scales of justice against the plaintiff, without requiring a new exemption of current state law, and without requiring new exemptions from professional rules on ethics.

2. That in the instant action, Ms. Mello, a Missouri attorney and member of the trial court bar, is the defendant in this legal malpractice action brought by a former client. Ms. Mello chose to represent herself pro se, in addition to having legal representation provided by her insurance company. But she also filed an appearance as counsel for the defendant (herself), demanding recognition as an officer of the court. Mr. Viehweg, the former client, who is not an attorney, filed the action as a pro se.

3. That in her demanded status as an officer of the court, Ms. Mello refused to refer to herself as the defendant, instead referring to herself only as counsel for the defendant, refused to accept proper service of papers by Mr. Viehweg, refused to appear for a properly noticed deposition, wrongfully attacked Mr. Viehweg's status as a pro se by filing a frivolous and malicious motion challenging his mental competency and requesting a guardian ad litem be appointed for him, repeatedly attacked Mr. Viehweg's status as a pro se by falsely and maliciously alleging through motions, affidavits, and oral arguments that she was afraid for her personal safety, and even authorized subpoena's by personally signing them as an officer of the court.

4. That Mr. Viehweg properly responded to Ms. Mello's wrongful actions by filing motions for the following: seeking sanctions for her wrongful conduct; to disqualify her as an officer of the court (not as a pro se); and to quash the subpoenas. That all of Mr. Viehweg's motions for relief were opposed by Ms. Mello, and denied by the trial court.

5. That Mr. Viehweg will argue in this appeal that the law does not allow, nor will it countenance, a defendant party, such as attorney Ms. Mello, wrongfully cloaking herself in the favorable attributes and privileges accorded officer of the court status, for the following reasons:

a. That in order for defendant party Ms. Mello to also stand in the capacity of an officer of the court, the blind scales of justice must be illegally tipped in her favor.

b. That in order for an attorney to enter an appearance in a civil action, that attorney must have a client who is, in some manner, a party to the action. Yet Ms. Mello has no client. Therefore, in order for Ms. Mello to be able to enter her appearance as an officer of the court without a client, the rule must be changed or an exception made.

c. That attorneys only act as officers of the court when they are engaged in the practice of law. Missouri law states that self representation is not the practice of law. Ms. Mello is merely representing herself. Therefore, in order for Ms. Mello to be recognized as an officer of the court - an

attorney engaged in the practice of law - Missouri law will have to be changed to recognize self-representation by attorneys as the practice of law.

d. That Missouri Supreme Court rules on ethics require not only that attorneys be objective, but that they refuse representation in matters in which they can not be objective. There is no matter less objective and more subject to an attorney than one involving the attorney as a defendant in a legal malpractice action for fraud. Therefore, in order for Ms. Mello to be allowed to stand as an officer of the court, in a legal malpractice action for fraud in which she is the defendant, the Missouri rules on such ethics will have to be waived, or ignored.

e. That Missouri Supreme Court rules on ethics require attorneys to refuse representation in matters in which they may be called as a witness. The rule is based upon the fact that when legal advocates become witnesses, the trier of fact is rightfully mislead, and the opposing party is unfairly prejudiced. Therefore, as Ms. Mello is one of two primary witnesses in this action, in order for "witness" Mello to be allowed to stand as an officer of the court "advocate", Missouri rules of ethics will have to be waived, or ignored.

f. That Missouri Supreme Court rules of ethics prohibit attorneys from offering any advice to a pro se, other than, that the pro se seek professional representation. Said prohibition is based upon the common sense that a parties' own subjective involvement in a legal action prohibits sound reasoning. Thus the birth of the legal profession - legal advocacy based upon objectivity. Therefore, in order for Ms. Mello to be allowed to stand as an officer of the court, Missouri rules of ethics will have to be waived, or ignored.

g. That denying an attorney dual status as a party and as an officer of the court can not prejudice the attorney. That as a pro se, an attorney/party has all of the same rights and privileges accorded any pro se.

6. That in the instant case, Ms. Mello's wrongful demand to be recognized as an officer of the court is

especially vile considering her unrelenting malicious attacks against Mr. Viehweg's status as a pro se (a status that is protected by the constitution and federal statute).

7. That this Court's ruling in this matter will be a precedent. That there are no court rulings directly on point (in fact, there are virtually no court rulings) as to this matter of whether a party to an action can simultaneously act as an officer of the court. That this appellant believes this scarcity of cases is simply because no attorney has ever had the audacity to attempt such a breach of justice, law, and professional ethics. That neither Ms. Mello, nor the lower court, has ever provided one scintilla of law in support of allowing her to act as an officer of the court.

8. That this Court's ruling will be law, hopefully rebalancing the scales of justice in this action, and any and all such future actions, and affecting and binding all lawyers potentially subject to its jurisdiction from such wrongful actions.

9. That it is not reasonable that Ms. Mello, alone, represent the potential interests of all attorneys subject to this Court's jurisdiction. That if any legal argument can be made in behalf of her, or any attorney/party, status as an officer of the court, it should be made in behalf of all those affected. If Ms. Mello, as a defendant, has the legal right to act as an officer of the court, certainly the Missouri Bar Association, as well as any other bar association that may be so affected by this Court's decision, will want to present such arguments and citations in her behalf, as well as on behalf of all the other lawyers who may wish to exercise such a right in the future. Certainly, if there is such a right, the Missouri Bar Association could provide the legal arguments and citations supporting it.

10. That appellant Viehweg hereby consents to a amicus curiae brief, by any state or national bar association, that the appellee, and, or, the association, wishes to file, in both Ms. Mello's support and on this issue.

11. That appellant Viehweg moves that, as provided for by FRAP 29, this Court request briefs, on this issue, from

all such bar associations as may be affected by this Court's decision, and that said briefs not be limited in their support of either party, but focus more on upholding the scales of justice and professional ethics.

Therefore, appellant Viehweg prays that this Court request amicus curiae briefs from the Missouri Bar Association, and other affected bar associations, on the issue of whether an attorney/party to a civil action can simultaneously stand in the capacity of an officer of the court, without violating justice, law, ethics, and professional common sense.

Respectfully submitted,

William H. Viehweg (signature)
William H. Viehweg
114 West 2nd South
Mt. Olive, IL 62069
1-217-999-5061

United States Court of Appeals
Eighth Circuit

William H. Viehweg,
Plaintiff/ Appellant

v Appeal No. 98-2732EMSL

Susan H. Mello,
Defendant/ Appellee

MOTION TO DISQUALIFY
Susan H. Mello, Scott C. Harper, Karen M. Speiser and
The Law Firm of Brinker and Doyen
and
Motion for Protective Order

Comes now appellant William H. Viehweg and in support of his motion to disqualify Susan H. Mello, Scott C. Harper, Karen M. Speiser, and the law firm of Brinker and Doyen, and for his motion for a protective order, states as follows:

1. That on July 16, 1998 Susan H. Mello entered her appearance in this case as "co-counsel for the defendant", a true copy of which is attached as Exhibit 1.

2. That appellant was not aware of Ms. Mello's said entry of appearance until August 17, 1998 when he personally viewed this court's file. That said entry contains no certificate of service. That appellant never received service.

3. That the appellee, Ms. Mello, is a party to this case who also happens to be an attorney, licensed by the State of Missouri, and a member of the trial Court's bar. Mello is represented on this appeal by counsel, Scott C. Harper and Karen M. Speiser of the law firm of Brinker and Doyen.

4. That the appellant, Mr. Viehweg, is a party to this

case who also happens to be a non-attorney. Viehweg appears pro se on this appeal.

5. That this Court has a duty to avoid even the appearance of partiality. In an analogy to the *average man test*, certainly an ordinary judge, being first and foremost an attorney, is so disconnected from Mr. Viehweg's representative group (non-attorneys), and so connected with Ms. Mello's representative group (attorneys), that he would be biased against Viehweg without even recognizing his prejudice. In this case, as the appellee is an attorney and a member of the trial Court's bar, and as the appellant is a non-attorney pro se, this Court's said duty is heightened. See HUTCHINSON V GERTSCH App., 159 Cl.Rptr. 40,49 (1979) as to the standard set in California trial courts when an attorney is in court as a litigant.

6. That, at any time in this case, should Ms. Mello choose to not be represented by and through her counsel, but by and through herself, her status, by default, is pro se, the same as the appellant's.

7. That Ms. Mello, by and through her entry of appearance as counsel of record, seeks recognition and standing in this case as an officer of this Court, in order to avail herself of all of said capacities rights, preferences, favorable presumptions, and special standing.

8. That the term "co-counsel for defendant" is reasonably defined as: one person, an attorney, who represents another person, her client. That Ms. Mello is only one person. She has no client.

9. That though Ms. Mello may act pro se in this appeal by representing herself, such self-representation is not recognized by the State of Missouri as the practice of law. That in this appeal, this Court has no legal authority to recognize Mello as an officer of its Court. See IN RE HEARD 106 B.R. 481 (Bkrtcy.N.D. Ohio 1989) where the judge went to extreme length to show authorization for sanctioning a pro se attorney as an attorney (he found it under "aura").

10. That this Court would be in violation, per se, of

its duty to remain impartial, if, in this case, it were to recognize Mello as an officer of its court.

11. That Ms. Mello's entry of appearance as counsel for herself was made in bad faith. That Mello, by knowledge gained through her practice of law outside of this case, is held to have known that her capacity as a party forbids this Court from also recognizing her in the capacity of an officer of the court, as said capacities are mutually exclusive, and, that her attempt to subom this Court's partiality in her favor, is unlawful per se.

12. That Mr. Harper and Ms. Speiser, as officers of this Court, had a primary duty to uphold justice. That at any and all times in this case, Ms. Mello was Harper's and Speiser's client. That Harper and Speiser are held strictly liable for any wrongful actions of their client that they knowingly endorse or condone. That Harper and Speiser are held to have known of Mello's entry of appearance, that it was filed in bad faith, and that it was unlawful, per se.

13. That Missouri rules of professional ethics prohibit an attorney from representing a client who knowingly pursues an unlawful end.

14. That the importance of a motion to disqualify and its potential, if denied, of continuing an injustice to the movant, is such that it is immediately appealable. That in this appeal, disqualification of counsel is appropriate to prevent an injustice to the appellant

15. That appellant apologizes for both the lack of citations, and that the two cited are not directly on point. Perhaps no attorneys have ever before attempted to stand as both party and officer of the court. On the other hand, perhaps they have, but that "professional courtesy" prevented the opposing party from calling their bluff.

THEREFORE, appellant William H. Viehweg moves that this Court disqualify Susan H. Mello from acting as an officer-of-the-court in this case, disqualify Scott C. Harper, Susan M. Speiser and the law firm of Brinker and Doyen from representing Ms. Mello in this case, and enter an order,

relevant to this appeal 1) prohibiting Mello from seeking status in this case as an officer-of-the-court; 2) prohibiting Mello from signing her name or referring to herself as anything other than her proper party status "appellee" or "defendant" (prohibited terms include "counsel for", "co-counsel for", "attorney for", and "co-attorney for"); and 3) warning Mello that a violation of this protective order warrants striking Mello's improperly signed document from the file, and/or to terminating Mello's time for oral argument.

AND LASTLY, for whatever other relief this Court deems just.

Respectfully submitted,

William H. Viehweg (signature)
William H. Viehweg
114 West 2nd South
Mt. Olive, IL 62069
1-217-999-5061

In The United States Court of Appeals
Eighth Circuit

William H. Viehweg,
Appellant,

vs. Appeal No. 98-2732EMSL

Susan H. Mello,
Appellee.

Defendant's Memorandum in Response to Plaintiff's Motion to Disqualify and Motion for Protective Order

COMES NOW Defendant, Susan H. Mello, by and through counsel, and in support of her Response to Plaintiff's Motion to Disqualify Defendant's Attorneys, Harper and Speiser, and the law firm of Brinker & Doyen, L.L.P., states to this Court as follows:

1. The present appeal is before this Court following an order by the United States District Court for the Eastern District granting Appellee's Motion for Summary Judgment.

2. On August 18, 1998, Appellant Viehweg filed a Motion to Disqualify Appellee Mello and Appellee's counsel from further representation in the present case as well as a Motion for Protective Order.

3. Appellant appears to argue that Appellee Mello must be disqualified from representing herself in this matter because an attorney may not represent herself as counsel in a cause of action to which she is a party. Then, Appellee {sic} asserts that Appellant {sic} Mello may represent herself, but not as an attorney. Finally, Appellant appears to argue that Appellee's counsel, Scott C. Harper and Karen M. Speiser, must also be disqualified because they had knowledge that Appellee could not be recognized as co-

counsel in a case where she was a party. Appellant's Motion accuses co-counsel Harper and Speiser of unethical conduct because they should have known that Appellee's self-representation was unlawful.

4. Appellant fails to direct this court to any statute or court rule stating that Appellee Mello may not enter her appearance as counsel on her own behalf. Appellee is unaware of any such statute or rule preventing a party from acting as her own counsel if she is a licensed attorney.

5. As Appellant admits in his Motion, the two cases he cites as support for disqualification of Ms. Mello do not even address disqualifying an attorney representing herself in a case where she is a party. In fact, in the case of *In re Leon S. Heard*, 106 B.R. 481 (Bkrtcy.N.B.Ohio 1989), which Appellant cites as support for his Motion, the court states that, "Even when an attorney represents [herself] in a *pro se* capacity, [s]he does not lose the aura of an officer of the court." By making this statement, the court not only recognizes an attorney's ability to represent herself in a case where she is a party, but also recognizes that an attorney still acts as an officer of the court even when engaging in self-representation.

6. Thus, it is not possible for Appellant [sic} Mello to represent herself without being recognized as an attorney and officer of the court. Appellee's {sic}argument that Appellant {sic}can represent herself as a *pro se* but not as an attorney is confusing and without merit or legal support.

7. Appellant also cites *Hutchinson v. Gertsch*, 159 Cal.Rptr. 40,49 (Cal.App.2d 1979), as support for Appellant {sic} Mello's disqualification. *Hutchinson* is a state court appellate opinion of no precedential value to this court. In addition, the court's opinion in that case does not even address the issue of attorney disqualification. Furthermore, the *Hutchinson* opinion recoginizes that an attorney may represent herself in a case where she is a named party.

8. Motions to disqualify should be reviewed with extreme caution for they can be misused as techniques of harassment. *Professional Service Industries, Inc. v. Kinbrell*,

758 F.Supp. 676, 680 (D.Kanses 1991). The right to be represented by counsel of choice is an important one, subject to override only upon a showing of compelling circumstances. *Id.* at 680. In addition, disqualification is not favored because it usually presents high costs to the litigants and the court system and temporarily disables the litigant in his effort to mount a defense. *Rizzo V. Sears, Roebuck and Co.*, 127 F.R.D. 423, 424 (D.Mass. 1989).

9. Appellant's Motion to Disqualify fails to set forth any compelling circumstances for disqualification of Appellee Mello or her counsel, Harper and Speiser. Appellant argues that continued involvement by Appellee Mello in her own defense represents an "injustice" to him before this court. Appellant does not specify what, if any, "injustice" is presented by Appellee's involvement in her own defense.

10. Furthermore, Appellant's suggestion that this Court cannot make an impartial decision when a licensed attorney is involved in a case as a party is groundless and lacks any legal support.

11. Appellant's Motion is without merit and represents a misuse of the legal system as it was filed to harass and annoy Ms. Mello and her counsel. Appellee Mello requests sanctions from this Court and requests the court issue an order preventing Appellant from filing any further frivolous motions during the pendency of this case.

12. WHEREFORE, Appellee Susan H. Mello respectfully requests this court deny Appellant's Motion to Disqualify and Motion for Protective Order. Appellee further requests this court to issue sanctions against Appellant for filing a frivolous motion before this Court. Appellant [sic}requests any and all other relief which this court deems just and proper.

Respectfully Submitted:

Brinker & Doyen, L.L.P.

Karen M. Speiser (signature)
Scott C. Harper #14582
Karen M. Speiser #79808
Brinker & Doyen, L.L.P.
120 South Central Avenue, Suite 700
Clayton, MO 63105
(314) 863-6311; (314) 863-8197 (fax)
Counsel for Defendant